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No. 10-278

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

EDUCATIONAL MEDIA COMPANY AT VIRGINIA TECH, INCORPORATED; CAVALIER DAILY, INCORPORATED,

Petitioners,

—v.—

SUSAN R. SWECKER, Commissioner, Virginia Alcoholic Beverage Control Commission; PAMELA O'BERRY EVANS, Commissioner, Virginia Alcoholic Beverage Control Commission; W. CURTIS COLEBURN, III, Chief Operating Officer Virginia Department of Alcoholic Beverage Control; FRANK MONAHAN, Director, Law Enforcement Bureau of the Virginia Department of Alcoholic Beverage Control; ESTHER H. VASSAR, Commissioner, Virginia Alcoholic Beverage Control Commission,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF

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I. THE COURT OF APPEALS RELIED ON "COMMON SENSE" RATHER THAN EVIDENCE IN UPHOLDING THE CHALLENGED REGULATION, IN DIRECT OPPPOSITION TO THE THIRD CIRCUIT DECISION IN *PITT NEWS*.

The Respondents argue that this case is distinguishable from *Pitt News v. Pappert*, 379 F.3d 96 (3rd Cir. 2004), because in this case, the government submitted evidence supporting a link between advertising in college newspapers and underage and binge drinking on campus. (Br. in Opp. at 7-8.) In fact, as in *Pitt News*, no evidence in the record supports such a link.

Although the Court of Appeals declared that "the link between § 5-20-40(B)(3) and decreasing demand for alcohol by college students [is] amply supported by the record," App. 77a, it did not identify any relevant record evidence. The court's sole citation to the record is a statement by Respondent W. Curtis Coleburn, the Chief Operating Officer of the Department of Alcoholic Beverage Control, that "[t]he college publication is where [college students are] looking to find out what's going on in their college community, what's happening." App. 77a (alteration in original). Based on this assertion, the court found it "*counterintuitive* for alcohol vendors to spend their money on advertisements in newspapers with relatively limited circulation, directed primarily at college students, if they believed that these ads would not increase demand by college students." *Id.* (emphasis added). Thus, the supposed connection between

alcohol advertising in college newspapers and college student drinking[1] derives from the court's intuition, based on the Respondent's understanding of the role of college newspapers, not on any evidence for such a link. Tellingly, this intuition is directly contrary to the Third Circuit's in *Pitt News*. *See* 379 F.3d at 107 (finding it "counterintuitive" to believe that an advertising ban in student newspapers would lessen drinking by college students exposed to a "torrent" of alcohol advertising from other sources).

Notably, the Court of Appeals did not purport to rely on any of the evidence that the Respondents claim, in their brief, demonstrates the efficacy of the regulation, and with good reason. Respondents point first to the testimony of their expert, Dr. Henry Saffer, to the effect that alcohol advertising increases consumption and that a decrease in advertising would decrease consumption. But undermining those broad conclusions was Dr. Saffer's acknowledgement that "'[t]here is . . . very little empirical evidence

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[1] As the dissent notes (App. 86a), "[t]he Board's justification for the regulation is not to reduce general 'demand by college students,' a significant number of whom are of legal age to imbibe, but to reduce '*underage* and *abusive* drinking among college students.'" (quoting Appellants' Br. at 2) (emphasis in original). Even if the supposed uniqueness of college student publications could be considered evidence of a link between advertising in college newspapers and demand for alcohol on campus, there certainly is no evidence that such advertising would cause an increase in underage and abusive drinking, rather than moderate drinking by students of legal age.

that alcohol advertising has any effect on actual alcohol consumption,'" and that "a ban on advertising in one medium generally results in greater advertising saturation in other media or forms of marketing." App. 85a. Further, Dr. Saffer has not conducted, and was not able to recall, any studies specifically examining the effectiveness of advertising bans in college student publications. J.A. 528-29.

Respondents also refer to statements from the Dean of Students and the Director of the Center for Alcohol and Substance Abuse Education at UVa, and the Director of Judicial Affairs at Virginia Tech, all to the effect that the regulation "will effectively assist" each institution's efforts to prevent underage drinking. Br. in Opp. at 8; App. 14a-15a. But as the district court noted, "these individuals likely do not qualify to offer expert opinions under Fed. R. Evid. 701," and, in any case, their conclusory statements are not supported by any evidence. App. 37a-38a.

Finally, neither the Court of Appeals nor the Respondents cite any evidence that the advertising advances the government's interests "to a material degree," as this Court's precedents require. *See Edenfield v. Fane*, 507 U.S. 761, 771 (1993); *44 Liquormart v. Rhode Island*, 517 U.S. 484, 505 (1996).

Thus, "as in *Pitt News*, 'the Commonwealth relies on nothing more than "speculation" and "conjecture"'" to support its claim that the advertising ban directly and materially reduces underage and abusive drinking. App. 85a (Moon, J., dissenting) (quoting *Pitt News*, 379 F.3d at

107-08). The Court should grant *certiorari* to clarify that such speculation, even when couched in terms of "logic" and "common sense," cannot justify a restriction on commercial speech, and to resolve the conflict between the Fourth Circuit and the Third Circuit.

II. PETITIONERS ARE NOT REQUIRED TO OBTAIN A STATE COURT CONSTRUCTION OF THE REGULATION BEFORE CHALLENGING IT IN FEDERAL COURT.

Respondents urge the Court to deny *certiorari* because no state court has determined that the challenged regulation applies to the Petitioners.[2] At the same time, they acknowledge that the Alcoholic Beverage Control Board, the agency charged with enforcing the challenged regulation, interprets it to apply to the Petitioners (Br. in Opp. at 11), and presumably would enforce the regulation against Petitioners if they violated it. Under these circumstances, the Petitioners need not wait for a state court to interpret the regulation before they may challenge its constitutionality in federal court. To hold otherwise would require Petitioners either to file a declaratory judgment action in state court seeking a construction of the regulation, or to engage in proscribed conduct and

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[2] Notably, the Respondents raise this issue for the first time in this Court. At no other time have they suggested that the regulation might not apply to the Petitioners, or that the absence of a state court construction might preclude a federal court ruling on its constitutionality.

risk prosecution. This Court has consistently rejected such prerequisites to federal court challenges to state laws.

This Court has long held that, faced with putatively unconstitutional state law, "it is not necessary that the plaintiff first expose himself to actual arrest or prosecution to be entitled to challenge the statute that he claims deters the exercise of his constitutional rights." *Babbit v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979) (citation and internal quotation marks omitted). Rather, to challenge such a law in federal court, the plaintiff need only show an "intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and [that] there exists a credible threat of prosecution there under." *Id.* "[A] refusal on the part of the federal courts to intervene when no state proceeding is pending may place the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding." *Steffel v. Thompson*, 415 U.S. 452, 462 (1974).

Nor must a plaintiff file a civil suit seeking a state court construction of a speech-restrictive state law before challenging it in state court. Such a requirement would be equivalent to obliging plaintiffs to exhaust state remedies, which this Court has held is not a condition for bringing a federal lawsuit under 42 U.S.C. § 1983. *Patsy v. Bd. of Regents*, 457 U.S. 496 (1982).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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